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12 HARTFORD LIFE INSURANCE COMPANY
13 and HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY
14

15 UNITED STATES DISTRICT COURT
16
17 NORTHERN DISTRICT OF CALIFORNIA
18

19 NICHOLAS J. BARBAROTTO,
20 individually and as Trustee of the
21 NICHOLAS J. BARBAROTTO Revocable
22 Living Trust Agreement dated
23 November 2, 2005,

24 Plaintiff,

25 v.

26 HARTFORD LIFE INSURANCE
27 COMPANY, a corporation doing business
28 as THE HARTFORD and HARTFORD
LIFE AND ACCIDENT INSURANCE
COMPANY, and DOES 1-10,

Defendants.

CASE NO. C 06 1278 CW

**REQUEST FOR JUDICIAL NOTICE OF
DEFENDANTS HARTFORD LIFE
INSURANCE COMPANY AND
HARTFORD LIFE AND ACCIDENT
INSURANCE COMPANY IN SUPPORT OF
OPPOSITION TO MOTION FOR RELIEF**

29 Defendants Hartford Life Insurance Company and Hartford Life and Accident Insurance
30 Company (jointly "Hartford") hereby request that the Court take judicial notice of the following
31 facts pursuant to Rule 201 of the Federal Rules of Evidence:

- 32 1. The complaint filed on June 7, 2007, styled *Vicki Caprio and Duane A.*
33 *Barbarotto as decedent Nicholas J. Barbarotto's Successors in Interest, Plaintiffs, vs. Hartford*
34 *Life Insurance Company, a corporation doing business as The Hartford and Hartford Life and*

1 *Accident Insurance Company, and Does 1 through 20, inclusive, Defendants*, in the Superior
2 Court of California, City and County of San Francisco. Attached as Exhibit 1 is a true and
3 correct copy of the complaint.

4 2. April 15, 2008 order granting Hartford's motion to dismiss on the ground of *res*
5 *judicata*, in United States District Court for the Northern District of California Case No. C 08-
6 338 CW. Attached as Exhibit 2 is a true and correct copy of the order.

7
8 DATED: May 29, 2008

SEDGWICK, DETERT, MORAN & ARNOLD LLP


9
10 By: 
11 BRUCE D. CELEBREZZE
12 MICHELLE Y. McISAAC
13 Attorneys for Defendants
14 HARTFORD LIFE INSURANCE COMPANY and
15 HARTFORD LIFE AND ACCIDENT INSURANCE
16 COMPANY
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EXHIBIT 1

12/19/2007 12:00 FAX 707 778 1088

BQS Law

003/020

06/08/07 11:24AM ONELE851 CR-AS Dykman & Wester

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06/07/2007 14:27 707-769-2999

WILLIAMS WESTER HALL

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ENDORSED
FILED
San Francisco County Superior Court

JUN 7 2007

GORDON PARK-LI, Clerk
BY: ~~CHRISTOPHER J. CONNOR~~ DEPUTY CLERK

NOV 9 2007 - 9:41 AM

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7
8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10
11 VICKI CAPRIO and DUANE A.
12 BARBAROTTO as decedent Nicholas J.
Barbarotto's Successors in Interest,

13 Plaintiffs,

14 vs.

15 HARTFORD LIFE INSURANCE COMPANY,
16 a corporation doing business as THE
17 HARTFORD and HARTFORD LIFE AND
ACCIDENT INSURANCE COMPANY, and
DOES 1 through 20, inclusive,

18 Defendants.
19
20

Case No.:

CCC07

164064

COMPLAINT

BY FAX

21 GENERAL ALLEGATIONS

- 22 1. Plaintiffs VICKI CAPRIO and DUANE A. BARBAROTTO alleges as follows:
23 2. NICHOLAS J. BARBAROTTO is the name of decedent.
24 3. NICHOLAS J. BARBAROTTO died on February 14, 2006 at South

25 San Francisco, California.

- 26 4. No proceeding is now pending in California for administration of the decedent's
27 estate.
28

COMPLAINT

12/19/2007 12:00 FAX 707 778 1086

BQS Law

004/020

1 5. The plaintiffs are decedent's successors in interest as defined in Section 377.11 of
2 the California Code of Civil Procedure and succeed to the decedent's interest in the action or
3 proceeding.

4 6. No other person has a superior right to commence the action or proceeding or to
5 be substituted for the decedent in the pending action or proceeding.

6 7. At all relevant times herein, defendant THE HARTFORD LIFE INSURANCE
7 COMPANY, a corporation doing business as THE HARTFORD and HARTFORD LIFE AND
8 ACCIDENT INSURANCE COMPANY ("HARTFORD") was, and is, a corporation with its
9 principal place of business in Connecticut, and is authorized to transact business in California,
10 and at all relevant times herein was transacting business in the state of California.

11 8. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as
12 Does 1 through 20, and plaintiffs are further ignorant of the appropriate charging allegations and
13 theories of liability with respect to said fictitiously named defendants, and therefore plaintiffs sue
14 such defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true
15 names and capacities when ascertained. Based on information and belief, each of the defendants
16 so designated herein is legally responsible and liable in some manner for the events and
17 happenings herein referred to, and is therefore liable and responsible to plaintiffs for an amount to
18 be hereinafter determined.

19 9. At all relevant times, defendants, and each of them, were the agents and
20 employees of each of the remaining defendants, and were at all times acting within the purpose
21 and scope of said agency and employment, and each defendant has ratified and approved the acts
22 of his agent.

23 10. Defendant HARTFORD issued an accidental death policy, number ADD-1037,
24 to the State Bar of California covering decedent and his wife, Tamara Barbarotto, in the amount
25 of \$125,000.

26 11. Defendant HARTFORD also issued a separate accidental death policy covering
27 decedent and his wife, Tamara Barbarotto, number ADD-6460, in the amount of \$50,000.
28

COMPLAINT

12/18/2007 12:01 FAX 707 778 1088

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1 12. All premiums due under the above-mentioned HARTFORD Policies (hereafter
2 "the Policies") were paid to defendant at all relevant times and decedent and/or Tamara
3 Barbarotto have performed all obligations under the Policies.

4 13. Tamara Barbarotto was injured at home as a result of an accident on July 2, 2002.

5 14. On October 19, 2002, Tamara Barbarotto expired as a result of the injuries
6 sustained in the July 2, 2002 accident.

7 15. Decedent filed timely claims for the total death indemnity under the Policies.

8 16. HARTFORD failed to conduct a reasonable investigation and acted unreasonably,
9 arbitrarily and capriciously in denying the claims made by decedent pursuant to the Policies,
10 subsequent to the death of Tamara Barbarotto. HARTFORD wrongfully denied the claim of
11 decedent relating to policy number ADD-1037 on December 14, 2004, and wrongfully denied
12 the claim of decedent relating to policy number ADD-6460 on June 7, 2005.

13
14 **FIRST CAUSE OF ACTION**

15 (Breach of Contract)

16 17. Plaintiffs refer to paragraphs 1 through 16 of the General Allegations and
17 incorporate those paragraphs as though set forth in full in this Cause of Action.

18 18. Decedent performed all conditions on his part to be performed under the
19 insurance contracts and all premiums due under said contracts have been paid.

20 19. Defendant HARTFORD has breached the subject insurance contracts by refusing,
21 without just cause, to pay plaintiffs' claims, and refusing, without just cause, to undertake and
22 complete a reasonable investigation of said claims.

23 20. As a direct result of defendant's breach of the subject insurance contracts, plaintiffs
24 have suffered contractual damages under the terms and conditions of the Policies, and other
25 incidental damages and out-of-pocket expenses, all in a sum to be determined according to proof at
26 the time of trial.

27
28
COMPLAINT

SECOND CAUSE OF ACTION**(Breach of Duty of Good Faith and Fair Dealing)**

21. Plaintiffs refer to paragraphs 1 through 16 of the General Allegations, and paragraphs 18 through 20, inclusive, of the First Cause of Action, and incorporate those paragraphs as though set forth in full in this cause of action.

22. Defendant breached their duty of good faith and fair dealing owed to plaintiffs in the following respects:

- (a) Unreasonable and bad faith failure to pay benefits to plaintiffs at a time when defendant knew plaintiffs were entitled to said benefits under the terms of the Policies.
- (b) Unreasonably withholding payments from plaintiffs in bad faith knowing plaintiffs' claim for benefits under the Policies to be valid.
- (c) Failing to pay plaintiffs death benefits pursuant to said claims at a time when defendant had insufficient information within their possession directly opposing said action.
- (d) Not attempting in good faith to effectuate a prompt, fair and equitable settlement of plaintiffs' claims for death benefits in which liability had become reasonably clear.
- (e) Bad faith failure to provide a reasonable explanation of the basis relied upon in the Policies, in relation to the applicable facts, for the denial of plaintiffs' claims for death benefits.
- (f) Unreasonably and in bad faith requiring plaintiffs to provide unnecessary and unreasonable information and documentation after already knowing that plaintiffs were entitled to receipt of the death benefit.
- (g) Plaintiffs are informed and believe and thereon allege that defendant has breached its duty of good faith and fair dealing owed to plaintiffs by other acts or omissions of which plaintiffs are presently unaware. Plaintiffs reserve the

COMPLAINT

1 right to seek leave of court to amend this Complaint at such time as plaintiffs
2 discover the other acts or omissions of said defendant constituting such
3 breach.

4 23. As a result of the aforementioned wrongful conduct of defendant, plaintiffs have
5 suffered, and will continue to suffer in the future, damages under the Policy, plus prejudgment
6 interest, for a total amount to be show at the time of trial.

7 24. As a further result of the aforementioned wrongful conduct of defendant,
8 plaintiffs were compelled to retain legal counsel to obtain the benefits due under the Policy.
9 Therefore, defendant is liable to plaintiffs for those expenses and attorney fees reasonably
10 necessary and incurred by plaintiffs to obtain the policy benefits in a sum to be determined at the
11 time of trial.

12 25. Defendant's conduct described herein was intended by the defendant to cause
13 injury to the plaintiffs, or was despicable conduct carried out by the defendant, with a willful and
14 conscious disregard of the rights of plaintiffs, subjected plaintiffs to cruel and unjust hardship in
15 conscious disregard of plaintiffs' rights, and was an intentional misrepresentation, deceit, or
16 concealment of a material fact known to the defendant, with the intention to deprive plaintiffs of
17 property, legal rights or to otherwise cause injury, such as to constitute malice, oppression or
18 fraud under CCP §3294, thereby entitling plaintiffs to punitive damages in an amount
19 appropriate to punish, or set an example, of defendant.

20
21 **THIRD CAUSE OF ACTION**

22 (ERISA Violation)

23 26. Plaintiffs refer to paragraphs 1 through 16 of the General Allegations, and
24 paragraphs 18 through 20, inclusive, of the First Cause of Action, and incorporate those
25 paragraphs as though set forth in full in this cause of action

26 27. Defendant's Policies have, at all times material, been an employee benefit plan
27 established by an employer engaged in commerce or in any industry or activity affecting
28 commerce within the meaning of 29 U.S.C. Section 1003(a)(1).

COMPLAINT

1 28. At all times, defendant and DOES 1 through 10, have been the administrator of
2 the Policies.

3 29. Decedent was an eligible employee participant in defendant's Policies.

4 30. Decedent has fully complied with all the conditions in order to receive these
5 benefits.

6 31. The decision by defendant that denied plaintiffs of the rights and benefits due
7 plaintiffs under the Policies was arbitrary, illegal, capricious, unreasonable, and not made in
8 good faith, and is breach of defendant's fiduciary duty owed to plaintiffs.

9 32. As a direct and proximate result of the actions of the defendant, plaintiffs have
10 been caused to incur attorney's fees.

11 33. As a direct and proximate result of the actions of the defendant, plaintiffs have
12 sustained damages in excess of \$175,000.

13
14 WHEREFORE, plaintiffs pray for judgment against defendant, and each of them, as
15 follows:

16 1. Damages for failure to provide benefits under the Policies, plus interest, including
17 prejudgment interest, in a sum to be determined at the time of trial;

18 2. Punitive and exemplary damages in an amount appropriate to punish or set an
19 example of defendant;

20 3. For expenses and attorneys' fees reasonably incurred to obtain the Policy benefits
21 in a sum to be determined at the time of trial;

22 4. For costs of suit incurred herein; and

23 5. For such other and further relief as the Court deems just and proper.

24
25 Dated: June 7, 2007

DYKMAN & WESTER, LLP

26
27 BY 
28

MATTHEW D. BREKHUS
Attorneys for Plaintiffs

COMPLAINT

EXHIBIT 2

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICKI CAPRIO and DUANE A. BARBAROTTO
as decedent Nicholas J. Barbarotto's
Successors in Interest,

Plaintiffs,

v.

HARTFORD LIFE INSURANCE COMPANY dba
THE HARTFORD and HARTFORD LIFE AND
ACCIDENT INSURANCE COMPANY,

Defendant.

No. C 08-338 CW

ORDER GRANTING
DEFENDANTS'
MOTION TO DISMISS
WITH LEAVE TO
AMEND

Defendants Hartford Life Insurance Company and Hartford Life and Accident Insurance Company move to dismiss the complaint filed against them by Plaintiffs Vicki Caprio and Duane A. Barbarotto. Plaintiffs oppose the motion. The matter was taken under submission on the papers. Having considered all of the papers filed by the parties, the Court grants Defendants' motion to dismiss with leave to amend.

BACKGROUND

1
2 On June 7, 2007, Plaintiffs filed the complaint in this case,
3 alleging that they are Nicholas Barbarotto's (Nicholas) successors
4 in interest and bring their claims on that basis. Plaintiffs
5 allege that Defendants issued an accidental death policy covering
6 Nicholas and his wife Tamara Barbarotto (Tamara) and a separate
7 accidental death policy covering only Tamara. Tamara was injured
8 in an accident on July 2, 2002 and died as a result of those
9 injuries on October 19, 2002. Plaintiffs allege that Nicholas
10 filed timely claims under the policies but Defendants "failed to
11 conduct a reasonable investigation and acted unreasonably,
12 arbitrarily and capriciously in denying the claims." Complaint
13 ¶ 16. Based on those allegations, Plaintiffs bring claims for
14 breach of contract, breach of the duty of good faith and fair
15 dealing and violation of the Employee Retirement Income Security
16 Act (ERISA).

DISCUSSION

17
18 Res judicata, or claim preclusion, prohibits the re-litigation
19 of any claims that were raised or could have been raised in a prior
20 action. Western Radio Servs. Co., Inc. v. Glickman, 123 F.3d 1189,
21 1192 (9th Cir. 1997) (citing Federated Dep't Stores, Inc. v.
22 Moitie, 452 U.S. 394, 398 (1981)). The purpose of the doctrine is
23 to "relieve parties of the cost and vexation of multiple law suits,
24 conserve judicial resources, and, by preventing inconsistent
25 decisions, encourage reliance on adjudication." Marin v. HEW,
26 Health Care Financing Agency, 769 F.2d 590, 594 (9th Cir. 1985)
27 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). Res judicata

1 operates where there is "1) an identity of claims, 2) a final
2 judgment on the merits, and 3) identity or privity between
3 parties." Western Radio, 123 F.3d at 1192 (citing Blonder-Tongue
4 Lab. v. University of Ill. Found., 402 U.S. 313, 323-324 (1971)).

5 Defendants argue that Plaintiffs' claims are barred based on
6 the doctrine of res judicata because a suit based on the same
7 insurance claims was filed in this District naming Nicholas as
8 plaintiff on February 22, 2006 (Nicholas Barbarotto v. Hartford
9 Life Insurance Company, C 06-1278 CRB). This case was filed by
10 counsel for Plaintiffs in the present case. On October 19, 2006,
11 Judge Breyer entered an order pursuant to the parties' stipulation
12 dismissing the 2006 suit with prejudice. Plaintiffs do not dispute
13 that the 2006 suit and this suit involve the same insurance claims.
14 Instead, Plaintiffs argue that the 2006 suit is a judicial nullity
15 because it was filed after Nicholas died on February 14, 2006.
16 Therefore, Plaintiffs argue, the dismissal of the 2006 suit is not
17 a valid judgment for purposes of res judicata.

18 In Banakus v. United Aircraft Corporation, 290 F. Supp. 259
19 (S.D.N.Y. 1968), the plaintiff was injured in an airplane crash.
20 Approximately half-an-hour before his attorney filed the complaint
21 in the action, the plaintiff died. Plaintiff's wife, as
22 administrator of his estate, filed a motion to amend the complaint
23 to add a claim for wrongful death and to substitute herself as
24 plaintiff. The New York court found that, because the plaintiff
25 was dead when the action was filed, "it must be treated as a
26 nullity and it cannot be given life by substituting parties and
27 amending the complaint." Id. at 260. Therefore, the court denied

1 plaintiff's wife's motion without prejudice to her filing a
2 wrongful death action.

3 Defendants argue that Banakus is distinguishable because
4 Plaintiffs did not attempt to substitute themselves as plaintiffs
5 in the 2006 suit. However, the Banakus court did not allow the
6 plaintiff's wife to substitute herself as the plaintiff.
7 Defendants also argue that Banakus is distinguishable because
8 "plaintiffs have brought an identical action as successors in
9 interest, and seek no new claims for relief." Reply at 4.
10 However, Plaintiffs' complaint includes a claim under ERISA, which
11 the 2006 suit did not. Moreover, Banakus is not binding authority
12 on this Court and it is not clear that the addition of a new claim
13 for relief was a key factor in the Banakus court's decision.

14 Defendants also cite Esposito v. United States, 368 F.3d 1271
15 (10th Cir. 2004), in support of their argument that the 2006 suit
16 was not a nullity. In Esposito, the Tenth Circuit reversed the
17 district court's dismissal of a wrongful death claim, which was
18 mistakenly filed with the decedent as plaintiff, and its denial of
19 the decedent's wife's motion to substitute as plaintiff. Both
20 Esposito and Banakus permitted the decedent's representatives to
21 pursue the decedent's claims.

22 Nonetheless, as Defendants argue, the three elements of res
23 judicata are met in this case. Plaintiffs seek to bring claims
24 identical to those dismissed with prejudice in the 2006 litigation.
25 Moreover, there is privity between Nicholas and Plaintiffs, acting
26 as his successors in interest. See Headwaters Inc. v. United

1 States Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005) (privity
2 exists between individuals and their successors in interest). Res
3 judicata is not a discretionary doctrine. See Southern Ry. Co. v.
4 Clift, 260 U.S. 316, 319 (1922) (noting that res judicata
5 "supersedes [discretion] and compels judgment"). Although the 2006
6 suit did not include an ERISA claim, the ERISA claim in this case
7 is also barred by res judicata because it could have been brought
8 in the 2006 suit.

9 If Plaintiffs wish to pursue these claims, they must seek a
10 judicial determination that the judgment entered in the 2006 suit
11 is void because the case was a nullity when filed.

12 CONCLUSION

13 For the foregoing reasons, the Court GRANTS Defendants' motion
14 to dismiss (Docket No. 3), and grants Plaintiffs leave to amend.
15 If Plaintiffs wish to file an amended complaint in this case, they
16 shall within ten days of the date of this order file in the 2006
17 suit a motion to void the judgment pursuant to Federal Rule of
18 Civil Procedure 60(b). Plaintiffs shall include in their motion
19 facts related to Nicholas's death and the subsequent filing of the
20 lawsuit in his name. In the interest of judicial economy,
21 Plaintiffs shall also file a notice of related cases suggesting
22 that Judge Breyer re-assign the 2006 suit to this Court. If the
23 2006 case is dismissed as a nullity, Plaintiffs may within ten days
24 thereafter file an amended complaint in this case alleging that the
25 2006 case has been voided. In that event, they shall contact the
26 clerk for a case management conference date. Otherwise, the

1 dismissal of this complaint will stand. The case management
2 conference currently scheduled for April 22, 2008 is hereby
3 vacated.

4 IT IS SO ORDERED.

5
6 Dated: 4/15/08

Claudia Wilken

CLAUDIA WILKEN
United States District Judge